No. 85-1409

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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This case presents a single and straightforward question of law: whether the "severity" regulation promulgated by the Secretary of Health and Human Services in the administration of the disability program under Title II and Title XVI of the Social Security Act is invalid on its face. The court of appeals so held. That holding, however, is clearly wrong. As we demonstrate in our opening brief, the severity regulation is firmly supported by the text of a number of provisions of the Social Security Act (Gov't Br. 19-28) and by the legislative history of the 1954, 1967 and 1984 Amendments to the Act (Gov't Br. 30-33, 38-41, 43-49. As we further demonstrate, the principle on which the severity regulation is premised—that benefits may be denied solely on the basis of medical evidence that the claimant's impairment is relatively minor—has been an important feature of the disability program since its inception in 1954 and has been applied to millions of claims since that time (Gov't Br. 34-38, 41-43, 49-50).

Respondent for the most part simply ignores the compelling legislative and administrative support for the severity regulation, and the amici supporting respondent do not even attempt to rebut our submission in this re-

gard. Respondent's challenge to the regulation instead rests almost entirely on 42 U.S.C. 423(d)(2)(A), which in her view requires consideration of the claimant's age, education, and work experience in every case. That interpretation is refuted by the language of Section 423(d)(2)(A), which merely prescribes several necessary (but not sufficient) conditions of eligibility; it does not prohibit a threshold screening mechanism under which the claimant may be denied benefits if he cannot even demonstrate that he has a medically severe impairment. The legislative history confirms that interpretation and manifests no intention to invalidate the then-existing version of the severity regulation, which had been promulgated in 1960 to implement the basic definition of the term "disability" in 42 U.S.C. 423(d)(1)(A).

Contrary to respondent's (and amici's) contention, the current version of the severity regulation merely carries forward and clarifies the substantive standard of medical severity under the 1960 regulation, and it therefore is likewise fully consistent with both 42 U.S.C. 423(d)(1)(A) and (2)(A). In any event, and again contrary to respondent's contention, the text and legislative history of the Social Security Disability Benefits Reform Act of 1984 make unambiguously clear that Congress has ratified the *current* version of the severity regulation. For this reason, respondent's and amici's extended discussion of alleged differences between the current and prior versions of the regulation, the relative numbers of claims denied under each, and the wisdom of labeling the current regulation a "de minimis" standard is quite beside the point.

A. We note at the outset that nothing in respondent's submission detracts from the manifest reasonableness of the severity regulation as a matter of common sense and administrative efficiency. It provides that an application for disability benefits will be denied—without specific consideration of the claimant's ability to perform his previous work or other jobs, in light of the so-called "vocational" factors of age, education and work experience—if the claimant fails to establish on the basis of medical evi-

dence alone that his impairment is "severe." However, the regulation evaluates the severity of an impairment not as an abstract medical matter, but in concrete, work-related terms. Thus, an impairment will be found non-severe only if it does not "significantly limit[] [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1520(c))—*i.e.*, "the abilities and aptitudes necessary to do most jobs," such as walking, standing, lifting, seeing, hearing, and understanding or carrying out instructions (*id.* § 404.1521(b)). Moreover, although the vocational factors are not considered at step two, Social Security Ruling (SSR) 85-28 explains: "An impairment or combination of impairments is found 'not severe' and a finding of 'not disabled' is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work *even if the individual's age, education, or work experience were specifically considered* (*i.e.*, the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities)" (Pet. App. 41a (emphasis added)).

Such a modest threshold requirement of medical severity should be entirely unobjectionable in a program in which eligibility is fundamentally premised on *medical* disability, not an adverse vocational profile. And indeed respondent and amici concede that *some* threshold medical standard is permissible if its application is limited to screening out claimants who have what they term "de minimis" impairments. It thus is not clear to what extent respondent and amici now actually challenge the facial validity of the severity regulation.

It does seem clear, however, that respondent and amici fail to appreciate that there are two distinct but overlapping functions served by the severity regulation: (i) it assures that disability benefits are paid only to those individuals for whom a significant medical impairment is actually a primary cause of their inability to work; and (ii) it screens out at an early stage those

claimants who, it may reasonably be presumed, would not be found disabled even if the Secretary were to undertake a full-blown vocational assessment. Respondent and amici address only the second purpose, arguing that the regulation is invalid to the extent it is applied to screen out *any* individual claimant who *might* be found to be disabled if his ability to perform his previous work and his age, education and work experience were specifically considered. See Resp. Br. 22-24. However, if pushed too far, this position would effectively require an individualized assessment of the claimant's vocational factors in every case, thereby sacrificing uniformity and ease of administration and causing vocational considerations to overshadow the central importance of a medical impairment.

The balancing of these competing considerations in the implementation of the statutory definition of "disability" has been entrusted by Congress to the "'exceptionally broad authority'" of the Secretary under 42 U.S.C. 405(a), and the Secretary's regulations must be sustained unless they exceed the Secretary's statutory authority or are arbitrary and capricious. See *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). Respondent does not contend that the severity regulation is arbitrary and capricious, but she does contend that the regulation exceeds the Secretary's statutory authority.

B. Respondent's argument that the severity regulation is inconsistent with the Social Security Act rests almost entirely on 42 U.S.C. 423 (d) (2) (A), which was enacted as part of the 1967 Amendments (§ 158(b), 81 Stat. 868). See Resp. Br. 19-22, 28, 39. This reliance is misplaced for three reasons.

1. The first flaw in respondent's reliance on an asserted inconsistency between the severity regulation and Section 423(d) (2) (A) is that any such inconsistency has been rendered irrelevant by Congress's supervening ratification of the severity regulation when it passed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*

a. The 1984 Amendments enacted the new 42 U.S.C. (Supp. II) 423(d) (2) (C), which codifies the concept of a "severe" impairment (emphasis added)):

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient *medical severity* that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a *medically severe* combination of impairments, the combined effect of the impairments shall be considered *throughout the disability determination process.*

Respondent attempts to brush aside this statutory provision with the assertion (Br. 41) that it "made no change in the 1954 definition of disability other than to require the Secretary to consider the combined effect of all of an individual's impairments on his ability to work." We of course agree with respondent that the 1984 Amendments made no change in the underlying definition of "disability," but that is irrelevant. The critical point for present purposes is that the first sentence of the new Section 423(d) (2) (C) expressly provides that the Secretary may continue to make the threshold assessment of "medical severity" at step two of the "disability determination process." Furthermore, the second sentence of Section 423(d) (2) (C) expressly contemplates that the subsequent steps of that process—including steps four and five, at which the Secretary considers the claimant's ability to perform his past work and his age, education and work experience—will be reached only if the Secretary first "does find" a "medically severe" impairment. Thus, congressional authorization for the sequential evaluation process, including the severity regulation, is now set forth in the Social Security Act itself.

Despite this explicit statutory text, respondent contends (Br. 40, 42-43) that Congress in 1984 at most intended to ratify not the threshold medical standard embodied in

the Secretary's published regulations, but some *other* standard, under which the Secretary could determine only whether the claimant's impairment is "slight" or "de minimis" in the abstract and would be required in every case to make at least an implicit evaluation of the claimant's age, education, and work experience. This contention is refuted by the language of Section 423(d)(2)(C), which states the test to be whether an impairment is medically "severe"—the precise term used in the regulation respondent challenges.

b. Any remaining doubt about whether Congress intended to ratify the severity regulation is dispelled by the legislative history of the 1984 Amendments. The Senate Report states that under "[p]resent law," "[m]edical considerations alone can justify a finding of ineligibility where the impairment[] is not severe," and that "[a]n impairment is nonsevere if it does not significantly limit the individual's physical or mental capacity to perform basic work-related functions." S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984). The "present law" to which the first passage just quoted refers of course is the severity regulation. The second passage in turn is essentially a quotation of that regulation, the next sentence of which expressly informs the claimant that the Secretary "will *not* consider [his] age, education, and work experience" at that step (20 C.F.R. 404.1520(c) (emphasis added)). The Senate Report then specifies that the new statutory directive to consider the combined effect of multiple impairments (i) "is to be applied in accordance with the existing sequential evaluation process," and (ii) "requires the Secretary to determine first, on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe" (S. Rep. 98-466, *supra*, at 22).

Respondent does not dispute that the Senate Report reflects unqualified approval of the severity regulation, but she contends (Br. 43) that the Conference Committee "rejected" the Senate's approach. Respondent is simply wrong. The House Report likewise eschewed any intention to mandate a change in the sequential evaluation process, beyond requiring consideration of the combined effect of multiple impairments. H.R. Rep. 98-618, 98th Cong., 2d Sess. 6-8 (1984). Because the House and Senate were in basic *agreement*, there was no occasion for the Conference Committee to "reject" the Senate's approach.[1] Moreover, the Conference Report also expressly approves the severity regulation. It states: (i) that "interests of reasonable administrative flexibility and efficiency" permit a finding of no disability if an impairment is "slight enough to warrant a presumption, even without a full evaluation of vocational factors, that the individual's ability to perform [substantial gainful activity] is not seriously affected"; (ii) that the "current 'sequential evaluation process' allows such a determination"; (iii) that a non-severe impairment for these purposes is " 'one which does not significantly limit basic work-related functions' "; and (iv) that there was no intention to "impair the use of that process" (H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29-30 (1984)). The Conference Report thus reinforces the conclusion that Section 423(d)(2)(C) ratified the severity regulation.

This conclusion is further reinforced by the remarks of Senator Long during the floor debate on the Conference Report (see Gov't Br. 47-49 & n.28). Senator Long observed that "[s]ome courts"—like the court below (see Pet. App. 5a, 9a)—"have ruled that the Secretary cannot deny claims solely on the basis that the individual has no severe medical condition but must always make an evaluation of vocational capacities" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)). But Senator Long made clear that Congress rejected this notion, stressing

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[1] The Conference Report states that, as relevant here, the Senate bill was the "[s]ame" as the House bill and that the Senate provision merely "*clarifie*[*d*] that the requirement applies to the determination of whether the individual has a combination of impairments which are *medically* severe, without regard to age, education, or work experience." H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984) (first emphasis added).

that the bill was "carefully drawn to reaffirm the authority of the Secretary to limit benefits to only those individuals with conditions which can be shown to be severe enough from a strictly medical standpoint—that is, without vocational evaluation" (*ibid.*).

Respondent attempts (Br. 43 n.25) to avoid the force of Senator Long's remarks by labeling them "partisan" and "post-conference." However, Senator Long was one of the principal sponsors of the disability program when it was enacted in 1956 (S. Rep. 2133, 84th Cong., 2d Sess. 140 (1956) (minority views); 102 Cong. Rec. 13052-13054 (1956)); was the Chairman of the Finance Committee at the time of the 1967 Amendments, upon which respondent relies (S. Rep. 744, 90th Cong., 1st Sess. 1 (1967)); and was the ranking minority member of the Conference Committee on the 1984 Amendments (H.R. Conf. Rep. 98-1039, *supra*, at 46). He therefore spoke with unique authority on the disability program and the 1984 Amendments, and his explanation of the Conference Report is significant precisely because it was "post-conference," especially since no Member of the House or Senate expressed a contrary view.[2]

2. Even if Congress's ratification of the severity regulation in 1984 were put to one side, respondent's reliance on an alleged inconsistency with 42 U.S.C. 423(d)(2)(A) would be without merit. The original version of the severity regulation was formally promulgated in 1960,[3]

[2] Respondent also contends (Br. 43 n.25) that Senator Long's remarks are not a "reliable" indicator of congressional intent because they reiterated the views in the Senate Report, which, respondent contends, were "rejected" in conference. However, to the extent there were differences between the two bills, Senator Long explained that the Conference bill "follow[ed] the *Senate* approach," not the House formulation, because the latter "might have been misinterpreted so as to raise a question about the ability of the Department to deny benefits at the initial stage of evaluation on the basis that there is no severe medical impairment" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984) (emphasis added)).

[3] 25 Fed. Reg. 8100 (1960); Gov't Br. 36. As we explain in our opening brief (at 34), the interpretation embodied in the 1960 regulation previously had been reflected in the *Disability Freeze State Manual*, issued in 1955. Respondent cites (Br. 35 n. 20) provisions of that *Manual* that addressed the circumstances in which age, education, and work experience would be considered. However, those provisions do not undermine the *Manual*'s explicit instructions that "[i]n the great majority of cases" the state agency would be able to evaluate the applicant's impairment solely on the basis of its "level of severity," and that the non-medical factors of age, education and experience should be considered only if a realistic assessment could not be made on the basis of "medical factors." Section 304.B (Gov't Br. 34). The same point is made in a 1958 booklet entitled "Disability and Social Security":

> [T]here are some obvious cases where the medical facts may be controlling. For example, where the only impairment is a moderate neurosis, moderate impairment of sight or hearing, or any other moderate abnormality, it would be obvious on the basis of medical considerations alone that the facts would not justify favorable determinations.

Quoted in Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 1st Sess., *Disability Insurance Fact Book: A Summary of the Legislative and Administrative Development of the Disability Provisions in Title II of the Social Security Act* 21-22 (Comm. Print 1959). These instructional materials refute respondent's contention (Br. 2, 32-33) that under the 1957 regulations (22 Fed. Reg. 4362 (Gov't Br. 38 n.22)), an inquiry into the claimant's education, training, and work experience was required in every case.

well before Section 423(d)(2)(A) was enacted in 1967, and its validity therefore does not depend on that section. Rather, the 1960 regulation implemented—and, as respondent concedes (Br. 2, 32-33), was fully consistent with—the basic definition of the term "disability" in Section 423(d)(1)(A).

Section 423(d)(1)(A) states that the term "disability" shall mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *." The statutory requirement that the claimant's alleged inability to work be "by reason of" a "medically determinable" impairment strongly supports a threshold test of medical severity, because it ensures, on a uniform basis, that the claimant's impairment is sufficiently major to justify its

consideration as the primary or substantial cause of his inability to work. See Gov't Br. 33. The central role of medical considerations is what distinguishes a disability program from other forms of unemployment assistance.[4] This interpretation is supported by the House and Senate Reports on the 1954 Amendments, which stress that disability evaluation has two aspects: the claimant must have "a medically determinable impairment of serious proportions," and there must be an inability to work "by reason of such impairment." H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954). Respondent does not dispute, or even discuss, these dispositive aspects of the text and legislative history of the basic definition of "disability" in 42 U.S.C. 423(d)(1)(A).[5]

[4] This was the contemporaneous construction of the definition of disability in the *Disability Freeze State Manual* of 1955. Sections 310-319 of the *Manual* elaborated upon the statutory terms. Section 314, entitled "By Reason of an Impairment," stated: "The impairment must be sufficiently severe to be the cause of inability to work." A similar explanation of the "by reason of" language was offered by Deputy Director Robert Ball during the extensive House oversight hearings in 1959. See Gov't Br. 36-37 n.21. In its report issued after those hearings, the Subcommittee likewise stated that "the individual's impairment must be the primary cause of the lack of capacity" (Subcomm. on Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 2d Sess., *Administration of the Social Security Disability Insurance Program: Preliminary Report* 19 (Comm. Print 1960)). The report explained that a "chronic condition" in an older worker that might affect his ability to find a job, but is not a "major handicap," does not qualify him for benefits; and it emphasized the distinction between a disability program, under which the failure to work must be attributable to a "major medical impairment," and an unemployment benefits program (*id.* at 19-20).

[5] Respondent does take issue (Br. 33) with our reliance (Gov't Br. 30-31) on statements in the House and Senate Reports that the claimant must be "totally" disabled (H.R. Rep. 1698, *supra*, at 23; S. Rep. 1987), *supra*, at 20), contending that there is no suggestion that those references were intended to "preclude" consideration of vocational factors. Respondent misunderstands our submission. We argued only that the emphasis on "total" disability suggested the prerequisite of a major impairment, not that

Nor is there any merit to respondent's contention (Br. 7, 19-20, 24 n.12, 25-26) that the severity regulation permits only an "abstract medical assessment" and is inconsistent with the Act's definition of disability "in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace" (*id.* at 19-20, quoting *Heckler* v. *Campbell*, 461 U.S. 458, 459-460 (1983)). The prior version of the regulation stated the test to be whether the impairment was "slight," a standard that was criticized by the Comptroller General and state agencies as vague. See Gov't Br. 42 n.24. By contrast, under the current version, the severity of the impairment is evaluated in terms of its effect on the claimant's capacity to perform basic activities that are necessary for most jobs, and therefore is directly tied to

Section 423(d)(1)(A) *precludes* consideration of vocational factors in all circumstances. Respondent's reliance (Br. 33-34) on SSA State Letter No. 174, issued in 1952, is misplaced for the same reason. Moreover, that Letter stated that the impairment must be of "major importance" (§ 3820 para. 1) and that "[i]n many cases, no decision as to total disability can be made without such social data as will describe the individual's education and work history" (*ibid.* para. 2), thereby implying that in some cases such information was not necessary.

Respondent also argues (Br. 34-35) that we quote out of context the portion of the 1954 Senate Report that refers to the development of standards for evaluating disability (see Gov't Br. 31-32), because the Report goes on to say that the standards "will reflect the requirement that the individual be disabled not only for his usual work but also for any type of substantial gainful activity" (S. Rep. 1987, *supra*, at 21) However, nothing in this passage undermines the requirement that the claimant have a severe impairment (the Senate Report itself describes impairments of "serious proportions") or suggests that such a requirement cannot be included among the contemplated "standards."

Finally, the testimony during the 1959 oversight hearings that respondent quotes (Resp. Br. 36-37) simply explains that a claimant may be found disabled even if his impairment is not so severe as to meet the listing of presumptively disabling impairments (compare 20 C.F.R. 404.1520(d)) and that an impairment may have a more serious impact on some persons than on others. These statements have no bearing on the issue presented in this case.

the central question of whether the claimant's inability to work is actually due to an impairment.[6]

3. Finally, even focusing narrowly on Section 423(d)(2)(A), as respondent urges, the severity regulation is well within the Secretary's statutory authority. That section provides that "an individual * * * shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (emphasis added). Especially in light of the phrase "only if," this language merely states necessary (but not sufficient) conditions of eligibility. Nothing suggests that it prescribes the *only* relevant conditions. In particular, Section 423(d)(2)(A) does not call into question the validity of the 1960 regulation that permitted the denial of benefits on medical grounds alone, without regard to the claimant's age, education, and work experience. Rather, as respondent concedes (Br. 39), Section 423(d)(2)(A) was enacted for the distinct purpose of further *restricting* eligibility by overturning judicial holdings that a claimant was disabled if he was unable to do his past work and there were no other jobs in the immediate vicinity for which he might be hired. H.R. Rep. 544, 90th Cong., 1st Sess. 28-30 (1967). This purpose is demonstrated by the provision in Section 423(d)(2)(A) that the claimant must be unable to do any substantial gainful work that exists in the national economy, "regardless of whether such work exists in the immediate area in which he lives,

[6] There also is no merit to respondent's contention (Br. 21, 25-26) that the severity regulation prevents the individualized assessment of disability contemplated by *Heckler* v. *Campbell*, 461 U.S. at 467. The determination whether an impairment significantly limits the claimant's ability to perform basic work-related functions assures the requisite assessment of "each claimant's individual abilities" (*ibid.*).

or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."[7]

Moreover, as we explain in our opening brief (at 40-41), the House and Senate Reports on the 1967 Amendments describe three distinct eligibility requirements in terms that directly parallel steps two, four and five of the sequential evaluation process adopted in 1978. The first of those requirements is that the individual must have "a *severe* medically determinable physical or mental impairment or impairments" (S. Rep. 744, *supra*, at 48-49 (emphasis added); H.R. Rep. 544, *supra*, at 30). This passage clearly contemplates that the Secretary may deny benefits on the basis of medical evidence alone, whether the applicable test is phrased in terms of whether the impairment is not "severe" (as under the current regulations that use the Reports' term) or "slight" (as under the version of the regulations in effect in 1967).

Respondent relegates her discussion of this legislative history to a footnote, contending that it is "'somewhat ambiguous'" and that it "'can be read'" simply as an explanation of the overall circumstances in which a finding of non-disability may be made, rather than as a "'fixed sequence'" of screening steps. Resp. Br. 38 n.22, quoting *Dixon* v. *Heckler*, 589 F. Supp. 1494, 1505 (S.D. N.Y. 1984), aff'd, 785 F.2d 1102 (2d Cir. 1986), petition

[7] Respondent contends (Br. 3, 20 n.10, 39) that because the disability determination for surviving spouses under 42 U.S.C. 423(d)(2)(B) is based solely on the level of impairment severity, without consideration of age, education, and experience, the omission of any comparable limitation in the contemporaneously enacted Section 423(d)(2)(A) forecloses that approach for other claimants. This contention is without merit. The regulation permitting the denial of benefits to other claimants based on medical factors alone was in existence prior to 1967, and it implemented Section 423(d)(1)(A), not the 1967 Amendments. Moreover, the fact that Congress precluded consideration of age, education, and work experience for surviving spouses scarcely establishes that Congress intended to *require* such consideration in all other cases. At most, the inference would be only that Congress intended to *permit* such consideration in appropriate circumstances, as the sequential evaluation process allows.

for cert. pending, No. 86-2. But even if the statutory language and legislative history were ambiguous (which they are not), the Secretary's construction of the 1967 Amendments as *permitting* both the former and current versions of the severity regulation plainly is reasonable, and therefore must be sustained. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984). That is especially so in light of the accommodation between the severity regulation and Section 423(d)(2)(A) in practical application. SSR 85-28 explains that an impairment will be found to be non-severe only when the medical evidence establishes that it "would have no more than a minimal effect on [the] individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a). As respondent appears to concede (Br. 22-23), under this interpretation, the severity regulation is not insensitive to the vocational factors of age, education and work experience referred to in Section 423(d)(2)(A).[8]

C. Respondent, joined by several amici, also contends that the severity regulation is inconsistent with the allocation of the burden of proof in what respondent maintains should be a "two-stage" inquiry (Resp. Br. 20-21), under which the claimant may establish a prima facie case by showing an inability to perform past work and the burden then shifts to the Secretary to show that the claimant is able to perform other work that exists in the national economy. See Resp. Br. 20-21, 23, 24-25, 26, 28-29, 39, 47 n.29; States Amicus Br. 6 & n.6, 15-16, 26-27; Cities Amicus Br. 13-16. There are a number of flaws in this contention:

1. Nothing in the Social Security Act rigidly confines disability determination to a "two-step" process. The Secretary has " 'exceptionally broad authority' " (*Heckler*

[8] Because SSR 85-28 is only interpretative and clarifying, it was not necessary, contrary to respondent's contention (Br. 29-30), for its publication to be preceded by notice and an opportunity for comment under 42 U.S.C. (Supp. II) 421(k). See 5 U.S.C. 553(b)(A).

v. *Campbell*, 461 U.S. at 466) to "regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. 42 U.S.C. 405(a). Pursuant to that authority, the Secretary has established a *five*-step disability determination process, which includes separate steps for the determination of impairment severity and ability to do past work. Respondent and amici have not shown that this is an arbitrary and capricious means for implementing the statutory definition of disability.

2. The allocation of the burden of proof under the case law upon which respondent and amici rely applies to the *vocational* aspects of disability determinations, and that allocation in fact is fully respected at those steps of the sequential evaluation process where the vocational aspects are considered. Thus, the claimant bears the burden of proof through the first four steps of the sequential evaluation process. If the claimant demonstrates at step four that he is unable to perform his previous work, then the burden shifts to the Secretary at step five to identify (often by reference to the medical/vocational guidelines) other jobs in the national economy that the claimant can perform. *Heckler* v. *Campbell*, 461 U.S. at 460. See, *e.g.*, *Brown* v. *Bowen*, 794 F.2d 703, 706 (D.C. Cir. 1986); *Goodermote* v. *Secretary of HHS*, 690 F.2d 5, 7 (1st Cir. 1982); *Bluvband* v. *Heckler*, 730 F.2d 886, 891 (2d Cir. 1984); *Rivera* v. *Schweiker*, 717 F.2d 719, 722-723 (2d Cir. 1983.[9]

[9] Respondent's reliance (Br. 28-29) on a 1986 House Committee Print in support of her contention that the severity step of the sequential evaluation process is inconsistent with burden-of-proof rules is seriously misleading. The Committee Print explains that "[t]he adjudication of claims is accomplished on a sequential basis" and describes the first four steps of that process, including the "not severe" determination at step two and the past work determination at step four. The print then states that "[a]t *this* stage [*i.e.*, at step *five*], because of a judicial opinion and subsequent administrative and legislative ratification, the burden of proof switches to the Government" to show that the individual can perform other work in the national economy. House Comm. on Ways and Means, 99th Cong., 2d Sess., *Background Material and Data on Programs*

3. The severity regulation does not conflict with the policies underlying the burden-shifting rule upon which respondent and amici rely. The allocation of the burden on vocational questions reflects the parties' relative expertise and access to information: although it is fair to require the claimant to prove that he is unable to perform a job he has done in the past and with which he therefore is familiar, the question whether there are other jobs in the national economy that a person with the claimant's functional limitations could perform concerns matters outside the claimant's knowledge and is properly committed to the Secretary, who may obtain the assistance of experts who are familiar with job requirements and markets. See *Kerner* v. *Flemming*, 283 F.2d 916, 922 (2d Cir. 1960) (Friendly, J.). However, step two of the sequential evaulation process, at issue here, does not address these vocational factors or require the claimant to assume the Secretary's burden of identifying jobs in the national economy that he could perform. Rather, the claimant must show that his own medical condition significantly limits his abilities and aptitudes, a matter within his knowledge and capacity to prove. See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

4. Whatever inference of inconsistency might be drawn from the judicial decisions upon which respondent and amici rely, the fact remains that Congress ratified the "current 'sequential evaluation process' " when it enacted the 1984 Amendments, expressly disavowing any intent to "impair" the operation of that process. H.R. Conf. Rep. 98-1039, *supra*, at 30; H.R. Rep. 98-618, *supra*, at 8; S. Rep. 98-466, *supra*, at 28. That congressional approval necessarily encompassed the feature of the sequen-

Within the Jurisdiction of the Committee on Ways and Means, 112-113 (Comm. Print 1986) (emphasis added). The statement in the 1978 preamble to the sequential evaluation regulations that "[t]he burden of proof remains as established by the case law and observed by SSA" (43 Fed. Reg. 55359)—which respondent and amici cite (Resp. Br. 4, 28; Cities Amicus Br. 15)—likewise referred to the shifting of the burden of proof at steps four and five of the sequential evaluation process.

tial evaluation process by which the determination of the claimant's ability to perform his own past work—and the resultant shifting of the burden to the Secretary to show the existence of other jobs if he cannot—will occur only if the claimant first establishes at step two that he has a severe impairment.[10]

5. The practical application of the severity regulation in any event gives due regard to factors bearing on the ability to do past work. As SSR 85-28 explains with respect to the current severity regulation (Pet. App. 43a):

> By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work.

SSR 85-28 further states that under current procedures, if the "evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work," the claim will not be denied at step two and the decision-maker will undertake "further evaluation of the individual's ability to do other work considering age, education and work experience" (*ibid.*). Compare *McDonald* v. *Secretary of HHS*, 795 F.2d 1118, 1126 (1st Cir. 1986).

D. Respondent and amici also contend that the current version of the severity regulation is invalid because, in their view, it imposes a heavier burden on the claimant than did the pre-1978 version, which they characterize as stating a "de minimis" test. Resp. Br. 5-8, 18, 23-27, 31 n.18, 33, 38-40, 43; States Amicus Br. 14-20, 26-28.

[10] SSR 82-55 and 82-56, which are reproduced in the appendix to respondent's brief, made clear that the severity regulation does not focus on the claimant's ability to do his past work. Resp. Br. App. 3a, 9a. The Senate and Conference Reports on the 1984 Amendments quote another portion of those rulings (S. Rep. 98-466, *supra*, at 22; H.R. Conf. Rep. 98-1039, *supra*, at 29), which indicates that Congress was fully aware of the portions relevant to this case as well.

The complete answer to this contention is that it was the *current* version of the regulation, not the prior version or some hypothetical "de minimis" standard, that Congress ratified in 1984. The new 42 U.S.C. (Supp. II) 423 (d)(2)(C) uses the term "severe" from the current regulation, and the legislative history demonstrates Congress's understanding that an impairment is non-severe for these purposes if it does not "significantly limit[]" the claimant's "ability to do basic work activities" (20 C.F.R. 404.1520(c)). See H.R. Conf. Rep. 98-1039, *supra*, at 29-30; S. Rep. 98-466, *supra*, at 22. In light of Congress's action in 1984, respondent's and amici's discussion of whether the current version of the severity regulation differs in substance from the prior version and whether the requirement of a "significant" limitation on the claimant's work-related abilities is a "de minimis" test has no relevance here.

In any event, the revision of the regulation in 1978 was *not* intended to work a substantive change. As respondent and amici concede (Resp. Br. 4; States Amicus Br. 17; Cities Amicus Br. 21-23), the Secretary stated when the sequential evaluation regulations were first proposed in 1978 that they were "not intended to alter the levels of severity for a finding of disabled or not disabled on the basis of medical conditions alone" (43 Fed. Reg. 9297 (1978)), and the Secretary reiterated that position when the regulations were promulgated in final form (*id.* at 55358).

Respondent contends (Br. 6), however, that the Secretary acknowledged in 1980 that he had "effected a substantive change back in 1978." Respondent relies on passages in the preamble to the 1980 revision stating that "[a]lthough the evaluation approach to impairments that are not severe has been in the regulations for some time, we expanded it in 1978," and that "greater program efficiency would be obtained by limiting the number of cases in which it would be necessary to follow the vocational evaluation sequence" (45 Fed. Reg. 55574 (1980)). Contrary to respondent's contention, however, these passages do not state that the threshold standard of severity was

increased. Rather, they refer to an expansion of the severity approach through a broader application of the *same* substantive test by clarifying that test and requiring that *all* claims be screened against it. Prior to 1978, the regulations did not prescribe a series of fixed checkpoints that effectively required a decision on the question of impairment severity in every case before vocational factors were considered. Accordingly, claims that could have been denied because the impairment was slight often were instead denied, after a full-blown vocational evaluation, on the ground that the claimant retained the capacity to do his past work or other work. By requiring the decision-maker to evaluate the severity of every claimant's impairment and by clarifying the operative standard, the new sequential evaluation regulations were expected to screen out a greater number of insubstantial claims at the outset. It was in this way, not by a change in the substantive standard, that those regulations "limit[ed] the number of cases in which it would be necessary to follow the vocational evaluation process" (*id.* at 55574).[11] The Appeals Council confirmed in 1980 that the new regulations were "not intended to change, but [were] merely a clarification of" the prior "slight impairment" standard. *Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations* (1980), quoted in *Brady* v. *Heckler*, 724 F.2d 914, 919-920 (11th Cir. 1984).

The statistics cited by respondent and amici (Br. 4; States Amicus Br. 21) showing that the percentage of claims denied on non-severe grounds rose from 8.4% in 1975 to 41.6% in 1981 (and then decreased to 23.1% in 1985) likewise do not establish any substantive change in the threshold level of medical severity under the 1978 regulations. Most of the increase occurred before those regulations even became effective in February 1979. Moreover, Congress has been fully aware of these trends and recognized that they resulted from the clarification of

[11] See SSA, Not Severe Impairment Workgroup, "Final Report and Recommendations," at 6 (Aug. 23, 1983) (Resp. Br. 7-8; States Amicus Br. App., Exh. L).